RECORD AND BRIEFS

No. 16-784

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In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the safe harbor of 11 U.S.C. § 546(e) prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred.

PARTIES AND RULE 29.6 STATEMENT

Petitioner Merit Management, LP was the defendant in the district court and the appellee in the court of appeals. Petitioner has no corporate parent, and no publicly held company owns 10% or more of its partnership interests.

Respondent FTI Consulting, Inc., in its capacity as Trustee of the Centaur, LLC Litigation Trust, was the plaintiff in the district court and the appellant in the court of appeals.

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OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1-18) is reported at 830 F.3d 690. The memorandum opinion of the United States District Court for the Northern District of Illinois (Pet. App. 19-39) is reported at 541 B.R. 850.

JURISDICTION

The court of appeals entered judgment on July 28, 2016, and denied rehearing en banc on August 30, 2016 (Pet. App. 40). The petition was filed on December 16, 2016, within the extended deadline approved in No. 16A492, and granted on May 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 546(e) states:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity

> broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Relevant portions of Sections 101, 544, 545, 547, 548, 550, and 741 of the Bankruptcy Code are reproduced in the appendix to this brief.[1]

INTRODUCTION

This case arises from a transaction in which Petitioner and others sold securities to Respondent's predecessor in interest for $55 million. The transaction was sufficiently complex that one financial institution funded the purchase price and another, acting as escrow agent, received it. As contemplated by the sale agreement, the escrow agent held some of the proceeds for more than three years before distributing them to Petitioner. The broader transaction thus involved three transfers that implicated the Section 546(e) safe harbor in four respects: a transfer *by* the funding institution *to* the institution serving as escrow agent, and two transfers *by* the escrow agent to Petitioner.

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[1] Unless otherwise indicated, all statutory citations in this brief are to sections within Title 11 of the United States Code, *i.e.*, the Bankruptcy Code.

Respondent, as the representative of the purchaser's bankruptcy estate, sued Petitioner to avoid and recover the payment of Petitioner's portion of the purchase price as a fraudulent transfer. The court of appeals below concluded that the purchase price was not transferred by or to a financial institution, and thus could be avoided, because the banks served as conduits between buyer and seller and had no beneficial interest in the transaction.

Respondent's effort to disregard financial institutions and to impose liability on an ultimate beneficiary of a transaction is inconsistent with the plain language of Section 546(e), which protects both transfers "by or to" financial institutions and transfers "for the benefit of" financial institutions. Respondent's position also has significant implications for entities that frequently act on behalf of others, such as securities clearing agencies, brokers, trust companies, and indenture trustees, and for the parties on whose behalf these institutions act – often in transactions several orders of magnitude larger than the middle-market stock sale involved here.

Congress has refined Section 546(e) over a period of more than 30 years, consistently expanding protection of transactions in the financial markets. The involvement of financial institutions, clearing agencies, brokers, and similar entities signifies that a transaction is sufficiently complex and significant that the parties' interests in finality should be respected. Congress elected to preclude bankruptcy trustees from

unwinding transactions in these circumstances, and its legislative judgment should be honored.

STATEMENT OF THE CASE

A. Statutory Framework and History.

Chapter 5 of the Bankruptcy Code gives a bankruptcy trustee a number of tools to attack pre-bankruptcy transactions and to collect funds for redistribution to creditors. Sections 544, 545, 547, and 548 permit a trustee to avoid transfers and obligations in particular circumstances, while Section 550 identifies the parties that may be required to return assets to the bankruptcy estate if a transfer is avoided.[2]

Each of the avoiding statutes includes constraints on a trustee's powers. For example, a trustee cannot avoid a bona fide payment of alimony as a preferential transfer, and many contributions to charitable organizations are protected from fraudulent-transfer claims. *See* §§ 544(b)(2), 547(c)(7), 548(a)(2).

Other limitations are included in Section 546 and cut across the various avoidance powers. Section 546(a) establishes a statute of limitations that normally runs two years after the bankruptcy filing. *See*

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[2] In a typical Chapter 11 case, the debtor in possession exercises these powers. *See* § 1107(a). It is common for these claims to pass from the debtor's bankruptcy estate to a liquidating trustee or a similar successor, such as Respondent, upon confirmation of a plan of reorganization or liquidation. *See* § 1123(b)(3)(B); *In re MPF Holdings US LLC*, 701 F.3d 449, 453-54 (5th Cir. 2012).

§ 546(a). Subsections (c) and (d) protect rights of reclamation asserted by general sellers of goods, producers of grain, and United States fishermen. *See* § 546(c), (d). And subsections (e), (f), (g), and (j) preclude a trustee from avoiding transfers made by, to, or for the benefit of particular parties in connection with transactions in securities, commodities, and financial products.[3] *See* § 546(e), (f), (g), (j).

Congress added the original version of the safe harbor at issue in this case to the Bankruptcy Code in 1982.[4] It was codified as Section 546(d) and protected margin payments and settlement payments made by or to commodity brokers, forward contract merchants, stockbrokers, and securities clearing agencies. *See* Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235, 236.[5]

Two years later, Congress added financial institutions to the safe harbor and redesignated it as Section 546(e). *See* Bankruptcy Amendments and Federal

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[3] These safe harbors do not apply to claims "under section 548(a)(1)(A)." *E.g.*, § 546(e). That section addresses transfers made "with actual intent to hinder, delay, or defraud" the debtor's creditors and is not at issue in this case. § 548(a)(1)(A).

[4] The Bankruptcy Reform Act of 1978 included a much narrower predecessor of today's Section 546(e). *See* § 764(c) (repealed 1982). Because the 1978 language was located in Subchapter IV of Chapter 7, it governed only in cases in which the debtor was a commodity broker. *See* § 103(d).

[5] This legislation repealed Section 764(c), *see id.* sec. 17(c), 96 Stat. at 240, and placed the new safe harbor in Chapter 5, where it applies in all cases under Chapters 7, 9, 11, 12, and 13. *See* §§ 103(a), 901(a).

Judgeship Act of 1984, Pub. L. No. 98-353, secs. 351, 460(d), 98 Stat. 333, 358, 377. The same legislation added Section 546(f), which provides similar protection to repo participants in connection with repurchase agreements. *See id.* sec. 393, 98 Stat. at 365.[6]

In 2005, Congress added "financial participant" to the list of parties that are protected when they make or receive margin payments or settlement payments. *See* BAPCPA sec. 907(o)(3), 119 Stat. at 182.

A 2006 amendment expanded Section 546(e) further to cover transfers made in connection with securities contracts, commodity contracts, and forward contracts. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692, 2697-98. That legislation also modified the phrase "by or to" to its current form: "by or to (*or for the benefit of*)" a financial institution or other protected party. *Id.* (emphasis added). In addition, Congress expanded the definition of "securities contract," explaining that the newly-added varieties of contracts "involve financial intermediaries – stockbrokers, financial institutions, financial participants or securities clearing agencies – that often hedge their risk on these transactions through other market transactions, repledge securities

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[6] The other safe harbors for financial transactions were first enacted in 1990 (Section 546(g), relating to swap transactions) and 2005 (Section 546(j), relating to master netting agreements). *See* Act of June 25, 1990, Pub. L. No. 101-311, sec. 103, 104 Stat. 267, 268; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter BAPCPA), Pub. L. No. 109-8, sec. 907(e), 119 Stat. 23, 177.

collateral received under these transactions, or both." H.R. Rep. No. 109-648, at 8 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1592.

B. Factual Background.

Petitioner owned 30.007% of the stock of Bedford Downs Management Corporation, which applied in 2003 for the last available harness-racing license in Pennsylvania. Valley View Downs, L.P. filed a competing application. The two companies pursued the license, and opposed one another's applications, for more than four years. The Pennsylvania State Harness Racing Commission denied both applications in 2005, and the Supreme Court of Pennsylvania upheld those denials in 2007. *See Bedford Downs Management Corp. v. State Harness Racing Commission*, 926 A.2d 908 (Pa. 2007).

Valley View then proposed a transaction to resolve the competitors' separate efforts to obtain the license. The parties agreed to the terms of a sale to be closed following the commission's award of the license to Valley View (J.A. 96). At that time, Valley View would purchase the stock of Bedford Downs for $55 million (J.A. 77-78). Valley View also agreed to purchase the land on which Bedford Downs had planned to build its racetrack, in which Petitioner had no interest, for $20 million (J.A. 76, 78). The agreement contemplated that an escrow agent would close both sales (J.A. 79). The real-estate transaction was to be fully consummated upon closing, but $7.5 million of the purchase price for the

stock was to be held by the escrow agent for at least two years to secure certain indemnity obligations of the Bedford Downs shareholders (J.A. 82-83).

The Commission awarded a harness-racing license to Valley View later in 2007. Citizens Bank of Pennsylvania agreed to serve as escrow agent for the stock and land sales under an escrow agreement dated September 4, 2007 (J.A. 40).

The Cayman Islands branch of Credit Suisse funded the purchase price as part of an $850 million transaction that also involved other affiliates of Valley View. Credit Suisse paid the $55 million purchase price for the stock of Bedford Downs and the $20 million purchase price for the related real property to Citizens on October 30, 2007 (Dist. Ct. Dkt. No. 60-10). Petitioner and other shareholders in Bedford Downs deposited their stock certificates into escrow with Citizens as well (J.A. 27-28, 35). After the transaction closed, Citizens disbursed the former shareholders' portion of the proceeds in two installments, one in October 2007 and another after the indemnity holdback period expired in November 2010 (J.A. 23, 64, 65). In total, Petitioner received approximately $16.5 million, including interest earned during the escrow period.

Valley View's business plan was to open a "racino" – a racing facility with slot machines. But Valley View was unable to obtain the gaming license necessary for the slot-machine operation by the deadline set forth in its financing package. Valley View and an affiliate thus filed bankruptcy petitions in Delaware in October

2009. The bankruptcy court confirmed a plan of reorganization for the debtors that created a litigation trust, with Respondent as trustee. Valley View's causes of action against Petitioner and others were contributed to that trust.

C. Proceedings Below.

Respondent filed suit in the Northern District of Illinois in 2011, seeking to avoid the transfer of $16.5 million to Petitioner under Pennsylvania fraudulent-transfer law, incorporated by Section 544(b) of the Bankruptcy Code, or under the Code's own fraudulent-transfer statute, Section 548. Respondent alleged that Valley View's purchase of Petitioner's stock was avoidable as a constructive fraudulent transfer. In other words, Respondent claimed that Valley View did not receive reasonably equivalent value in exchange for its payment of $16.5 million, and Valley View was insolvent at the time of the transfer. *See* 12 Pa. Cons. Stat. § 5105; § 548(a)(1)(B)(ii)(I).

Petitioner moved for judgment on the pleadings, invoking the safe harbor of Section 546(e). The district court noted that the essential facts were undisputed, including the presence of financial institutions and either a settlement payment or a securities contract in the stock transaction (Pet. App. 20, 24). Relying on Seventh Circuit precedents that emphasized the broad text and plain meaning of Section 546(e), the district court concluded that Petitioner was entitled to the

benefit of the safe harbor and granted judgment in Petitioner's favor (Pet. App. 39).

The Seventh Circuit reversed, holding that the safe harbor does not apply when a financial institution "is neither the debtor nor the transferee but only the conduit" (Pet. App. 2). It concluded that the phrase "by or to" in Section 546(e) is ambiguous and that the more recent addition "(or for the benefit of)" is ambiguous as well (Pet. App. 5-6). The court thus turned to what it understood to be "the statute's purpose and context" (Pet. App. 6). Drawing on other provisions of the Bankruptcy Code that it believed were analogous, the court of appeals concluded that "it is the economic substance of the transaction that matters" (Pet. App. 12).

The Seventh Circuit also looked to the legislative history of the safe harbor, perceiving a fundamental goal of protecting the securities and financial markets from systemic risk (Pet. App. 13-15). Describing Valley View and Petitioner as "simply corporations that wanted to exchange money for privately held stock," the court dismissed the notion that its narrow view of Section 546(e) could produce "any potential ripple effect through the financial markets" (Pet. App. 15).

The court of appeals acknowledged that it was disagreeing with five other circuit courts (Pet. App. 16). But it concluded that "[i]f Congress had wanted to say that acting as a conduit for a transaction" involving entities that are not identified in the statute "is enough

to qualify for the safe harbor, it would have been easy to do that" (Pet. App. 18).

SUMMARY OF ARGUMENT

I. Congress has expanded the safe harbor of Section 546(e) over a period of several decades. In its current form, the statute expresses Congress's decision to provide robust protection of securities and commodities transactions involving certain types of institutions against claims by bankruptcy trustees, unless the debtor engaged in the transaction with the intent to hinder, delay, or defraud creditors. The involvement of financial institutions, stockbrokers, securities clearing agencies, and the like is an indication that a securities or commodities transaction is sufficiently large and complex that unwinding it is likely to disrupt the capital markets, the settled expectations of the parties, or both.

The plain language of Section 546(e) precludes a trustee from avoiding a transfer made "by or to (or for the benefit of)" a financial institution or any other protected party. Valley View, via Credit Suisse, transferred the purchase price to Citizens, which was then empowered to hold those funds, pay them over to Petitioner and others if certain conditions were satisfied, or return them to Valley View in other circumstances. The ultimate disposition of the funds does not change the fact that one financial institution – Credit Suisse –

transferred them to another financial institution – Citizens – which then made two further transfers to Petitioner.

Before 2006, the statute referred to transfers "by or to" financial institutions and other entities. Congress added a third possibility – "(or for the benefit of)" – in 2006. Under accepted principles of statutory interpretation, each of the three alternatives in Section 546(e) should be given a separate meaning. The Seventh Circuit's construction requires ignoring the institution identified in the statute, and renders the safe harbor ineffective, unless that institution also benefits from the transfer. It thus runs afoul of the basic rule that every word of a statute must be given effect.

A broadly protective interpretation of the safe harbor is consistent with the context and purpose of the statute as well. Chapter 5 of the Bankruptcy Code serves two fundamental purposes: a number of avoidance and recovery powers permit a trustee to recover property to augment the bankruptcy estate, but Section 546 includes several bright-line limitations on those powers. This sort of legislative balancing of interests is common in the Bankruptcy Code; fundamental debtor protections such as the automatic stay and the discharge are subject to exceptions that protect the interests of particular creditors, the financial markets, and society at large.

A plain-meaning interpretation of the statute also is necessary to make the inclusion of securities clearing agencies in the safe harbor meaningful. A

securities clearing agency is a quintessential intermediary that acts for the benefit of other parties; it does not send or receive securities-related transfers for its own benefit. If a clearing agency is disregarded for that reason – as the Seventh Circuit concluded a bank providing acquisition financing and an escrow agent should be – then the inclusion of clearing agencies in Section 546(e) serves no purpose. Well-established principles of interpretation counsel against that outcome.

II. The Seventh Circuit's approach to the safe harbor lacks a rigorous foundation and would lead to problematic outcomes. That court conflated separate concepts from two different sections of the Code: the entity that a transfer is made "to" under Section 546(e) and the "initial transferee" from which the trustee may recover under Section 550(a). Avoidance and recovery are distinct processes under the Code, and the trustee can benefit from avoidance of certain transfers without pursuing recovery from anyone. Conversely, Section 546(e) bars the trustee from avoiding a transfer at all, so that there is no need to consider who might be required to repay it. The court of appeals' reliance on Section 550 is especially problematic because the restrictive interpretation of "initial transferee" – *i.e.*, the conduit principle – was not developed by the courts until years after Congress established the safe harbor and included financial institutions within it. And because Section 550 addresses only transfer recipients, it does not determine, or even inform, whether a transfer

is made "by" a financial institution or another protected entity.

The Seventh Circuit's cramped interpretation of the safe harbor also would introduce mischief into the financial markets. Financial institutions serving in roles that might be characterized as intermediaries – common-law trustees, indenture trustees, and perhaps mutual funds – would be disregarded, or at least subject to litigation while the lower courts fleshed out the contours of the conduit rule. The largest and best-capitalized commercial banks and investment banks would be protected when trading in their own assets, but their customers – including individual investors, employee stock ownership trusts, pension funds, and others – would not. This potential liability overhang would require prudent investors to create reserves or other contingency plans after receiving funds in a securities or commodities transaction, rather than enhancing market liquidity by making new investments.

The Seventh Circuit also erred by using Congress's stated goal in enacting the original statute in 1982 to constrain the scope of the statute after it had been modified multiple times through 2006. These amendments plainly expanded the statute beyond its original formulation, such that earlier legislative history no longer describes the safe harbor fully and accurately.

The court of appeals' concern that financial institutions are involved in some fashion in nearly every securities or commodities transaction, leaving

no transfers to be avoided, is not a basis to deny coverage to financial institutions and parties with beneficial interests in transactions. The unqualified language of the safe harbor indicates that the legislature intended to sweep quite broadly, but a precise determination of the outer limit of the safe harbor is not necessary to resolve this case. A financial institution that is involved in the financing, settlement, or administration of a securities or commodities transaction is roughly comparable to the other institutions that were included in the safe harbor when financial institutions were added, such as stockbrokers and securities clearing agencies. A construction of Section 546(e) that encompasses financial institutions playing meaningful roles in these transactions adequately protects the interests and expectations of market participants and is sufficient to require reversal here.

ARGUMENT

I. Section 546(e) Bars a Trustee from Avoiding a Transfer Made by or to a Financial Institution, Even if the Transfer Is Not Ultimately for the Benefit of That Institution.

The basic facts in this case are undisputed. Credit Suisse and Citizens, which made and received the transfers at issue, are financial institutions. The transfers were either settlement payments or were made in connection with a securities contract.

Transfers of this sort are "made by or to (or for the benefit of)" a financial institution, and thus cannot be avoided, as demonstrated by the plain language of Section 546(e); its structure, history, and purpose; and fundamental canons of construction.

A. The language "transfer by or to (or for the benefit of)" is broad, and its meaning is plain.

The plain-meaning principle has long governed the Court's interpretation of the Bankruptcy Code and other statutes. When "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *see also Patterson v. Shumate*, 504 U.S. 753, 758 (1992) ("applicable nonbankruptcy law" includes both state and federal law); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946-47 (2016) (treating Puerto Rico as excluded from the definition of "State" only in the single circumstance specified in the definition).

1. Section 546(e) protects a transfer made by *or* to *or* for the benefit of a financial institution or another specified entity. Congress's use of the disjunctive indicates that a transfer *by* or *to* an institution is something distinct from a transfer that is *for the benefit of* that institution. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given

separate meanings, unless the context dictates otherwise; here it does not."); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61 (1980) (construing "the broadly inclusive disjunctive phrase 'action or proceeding'" to include administrative proceedings in addition to actions in court).

The legislature's use of "or" in the safe harbor indicates that a transfer is protected even if it meets only one of the three alternatives. For example, in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, the Court concluded that a debtor pursuing confirmation of a plan over the objection of its secured creditor must satisfy only one of three options "connected by the disjunctive 'or'" in Section 1129(b)(2)(A) of the Bankruptcy Code. 132 S. Ct. 2065, 2072 (2012). A contrary interpretation would leave "by" and "to" with no independent significance: a transfer by or to an institution would not be protected unless it also were for the benefit of that institution, in which case it would be protected for the latter reason alone. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (rejecting interpretation of statute that would make one alternative "a mere subset" of another).

If Congress had intended to require a financial institution, or one of the other entities identified in Section 546(e), to have a beneficial interest in a transfer before the safe harbor is triggered, it would have been easy for the legislature to so provide. In an ordinary case, Congress's failure to pursue that course would be strong evidence that it did not intend that outcome. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct.

1652, 1659 (2017) (Congress's failure to adopt a "ready alternative . . . indicates that Congress did not in fact want" that result). But in this case, Congress did far more than merely decline to adopt more restrictive language; it amended the original formulation "by or to" in 2006 to read "by or to (or for the benefit of)."

Congress acted after the Eleventh Circuit had adopted a restrictive interpretation of the statute in *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (disregarding financial institution that "never acquired a beneficial interest in either the funds or the shares"). Congress thus made it clear that an institution's transfer or receipt of a transfer is something distinct from its beneficial interest in that transfer and that any one of these is sufficient to bring the transaction within the safe harbor. *See generally Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (explaining that one may obtain property without owning it); *In re Quebecor World (USA), Inc.*, 719 F.3d 94, 99-100 (2d Cir. 2013) ("[W]e conclude that a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both.").

The safe harbor is thus triggered if a debtor makes a transfer *to* a protected institution, or if property is transferred *by* that institution, even if the institution does not have a beneficial interest in the property transferred. The opposite is true as well: if, for some reason, Petitioner had served as escrow agent in a transaction in which Citizens had sold securities, a trustee for the purchaser would not be able to avoid the payment of the purchase price.

2. The Bankruptcy Code also includes "an expansive definition of transfer." *Barnhill v. Johnson*, 503 U.S. 393, 400 (1992). Among other things, it covers "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" property or an interest in property. § 101(54). Valley View's payment, via Credit Suisse, to Citizens of the $55 million purchase price for the stock of Bedford Downs fits easily within this definition.

After those funds were in escrow, neither Valley View nor Credit Suisse had the ability to demand that they be returned, nor to direct how or to whom Citizens paid the funds, except within the pre-established strictures of the escrow agreement.[7] Credit Suisse, on behalf of Valley View, thus disposed of or parted with the $55 million, at least on a conditional basis – *i.e.*, it transferred the funds *to* Citizens.

3. For the same reasons, the funds were not at that point transferred *to* Petitioner. When Credit Suisse and Valley View relinquished possession and control of the funds by depositing them with Citizens,

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[7] One of the principal purposes of an escrow arrangement, of course, is to establish clear rules about the conditions that will result in the final distribution of the escrowed property to one party or the other. As it turned out, another important purpose was served in this case as well: although Valley View filed for bankruptcy protection while the $7.5 million indemnity fund remained in escrow, that money did not become part of its bankruptcy estate, and it was paid to the former shareholders as the contract contemplated. *See generally In re Expert South Tulsa, LLC*, 619 F. App'x 779, 782 (10th Cir. 2015) (discussing treatment of escrowed property in bankruptcy).

there was no certainty that any of the money would ever reach Petitioner or the other shareholders of Bedford Downs. Among other possibilities, the sale might not have closed because of the failure of a condition, or a dispute among the parties might have caused Citizens to interplead the funds. Even after the sale closed, Petitioner could have assigned its rights under the contract to another shareholder or a third party, or Valley View could have asserted a claim to the $7.5 million indemnity fund held by Citizens after the closing.

As it turned out, the conditions to closing were satisfied, and Petitioner retained its interest in the transaction. As a result, Petitioner's share of the purchase price, plus interest, eventually was transferred to Petitioner. But Citizens, a financial institution, made those transfers to Petitioner, and they also are protected by the plain language of Section 546(e).

B. A protective interpretation of the safe harbor is consistent with the structure and purpose of Section 546 and the Bankruptcy Code generally.

The plain language of Section 546(e) is consistent with its context and purpose, as well as with the Bankruptcy Code more generally. *See, e.g.*, *Hall v. United States*, 132 S. Ct. 1882, 1893 (2012) (relying on plain language, context, and structure to interpret the Code); *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991) (considering "sometimes conflicting policies" underlying the Code).

1. The safe harbor of Section 546(e) is one of four essentially similar provisions that preclude avoidance of transfers to participants in particular types of transactions, except for transfers motivated by actual fraudulent intent. *See* § 546(e), (f), (g), (j). Each safe harbor establishes a bright line, without regard to the dollar value of the transfer or the likely impact its avoidance would have on the parties or the broader market. Congress enacted these safe harbors in four separate bills over a period of more than 20 years. And Congress added the phrase "(or for the benefit of)" to each safe harbor in 2006. *See* Financial Netting Improvements Act of 2006, sec. 5(b), 120 Stat. at 2697-98.

Section 546(e) itself grew in scope over that period. It began as a means of protecting margin payments and settlement payments among core participants in the securities and commodities markets. In many circumstances, these parties handle funds belonging to customers or other market participants, and they might be characterized as intermediaries. Congress expanded the statute over time to encompass additional parties and transactions that do not involve the public markets at all, such as a contract to purchase a certificate of deposit or a forward contract for the delivery of coal. *See* §§ 741(7)(A)(i), 101(25)(A); *CFTC v. Erskine*, 512 F.3d 309, 324 & n.3 (6th Cir. 2008) (explaining that a forward contract is not standardized or traded on an exchange).

Other subsections of Section 546, though worded differently, perform the similar function of protecting

parties that might otherwise be subject to liability under the trustee's avoiding powers. Each also draws a bright line, without regard to the details of the claim or property involved. For instance, the statute of limitations is absolute; it does not depend on the value of the claim that is barred. *See* § 546(a). Similarly, the protections given to a United States fisherman do not require the court to evaluate the degree of harm that might befall the fisherman or the wholesale seafood market if he were not permitted to exercise his right of reclamation. *See* § 546(d).

2. The Bankruptcy Code does not have a single purpose. *See Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008); *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). Maximizing the value of the bankruptcy estate is one of the important themes underlying the Code. *See Piccadilly*, 554 U.S. at 51. There are other broad priorities as well, including providing a fresh start for the debtor, *see FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 305 n.4 (2003); giving the debtor a respite from litigation, *see generally Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 503 (1986); discouraging creditors from racing to the courthouse, *see Union Bank*, 502 U.S. at 162; and encouraging talented attorneys to practice bankruptcy law, *see Baker Botts v. ASARCO, LLC*, 135 S. Ct. 2158, 2168 (2015).

Congress has carved out many exceptions to these general bankruptcy principles. With respect to avoidance actions – which represent only one component of the trustee's estate-maximizing powers – Congress has

enacted a number of constraints. They include affirmative defenses to preference claims, *see* § 547(c), (h), protection of charitable contributions, *see* §§ 544(b)(2), 548(a)(2), several sections ensuring a creditor's right to terminate or liquidate financial arrangements, *see* §§ 555, 556, 559, 560, 561, and the safe harbors in Section 546. To the extent that it is possible to distill a single collective purpose from these provisions of the Code, it would be quite general: the trustee may recover assets for distribution to creditors, except in particular situations that Congress has declared off-limits.

Other broad bankruptcy principles are subordinated to particular congressional policy choices as well. The automatic stay is a fundamental protection that permits debtors to focus on moving forward with their financial futures rather than dealing with dunning calls and lawsuits arising from the past. But Congress has determined that some proceedings – such as a divorce case, the government's commencement of a regulatory action, or revocation of the accreditation of a school – may go forward despite the automatic stay. *See* § 362(b)(2), (4), (14). And the ultimate goal of any debtor is to align his or her future income and expenses by modifying or discharging debts. Yet Congress has legislated significant protection for student loans, which are very difficult to discharge, and home mortgages, which cannot be modified in Chapter 13. *See* §§ 523(a)(8), 1322(b)(2); *Nobelman v. American Savings Bank*, 508 U.S. 324, 327 (1993).

When this Court has considered statutory language that restricts a trustee's efforts to augment the bankruptcy estate, the statutory limitation has prevailed over the trustee's policy arguments. In *Patterson*, the Court rejected a trustee's attempt to recover the debtor's interest in an ERISA pension plan, because the clear language of the Code renders an anti-alienation provision in an ERISA plan enforceable in bankruptcy. *See Patterson*, 504 U.S. at 758-59. The Court found unpersuasive the trustee's reliance on the "policy of ensuring a broad inclusion of assets" in the estate. *See id.* at 763-64. Similarly, in *Piccadilly*, the Court rejected the debtor's argument that requiring it to pay transfer taxes on asset sales would impair the value of its estate. *See Piccadilly*, 554 U.S. at 50. And the Court interpreted Section 547(c) to protect both short-term and long-term creditors against preference claims, unpersuaded by the trustee's argument that allowing him to recover would further the policy of equal distribution. *See Union Bank*, 502 U.S. at 161-62.

By the enactment of Section 546(e) and several amendments, Congress has chosen to protect markets and the settled expectations of buyers and sellers when a securities or commodities transaction is consummated. A court cannot and should not second-guess Congress's specific choices merely because it believes that a different result would be more equitable or would advance the interests of the bankruptcy estate or its creditors. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017); *Law v. Siegel*, 134 S. Ct. 1188, 1197-98 (2014); *Central Trust Co. v. Official*

Creditors' Committee of Geiger Enterprises, Inc., 454 U.S. 354, 359-60 (1982).

C. A judicially imposed beneficial-interest or non-conduit requirement would render the inclusion of securities clearing agencies in the safe harbor meaningless.

A restrictive construction of Section 546(e) also would run afoul of the canon disfavoring an interpretation of a statute that renders a provision ineffectual or superfluous. *See NextWave*, 537 U.S. at 301; *Hall*, 132 S. Ct. at 1890.

Securities clearing agencies were included in the 1982 version of the safe harbor, even before the amendment that added financial institutions. Yet under the Seventh Circuit's approach, clearing agencies would not be protected by the safe harbor. The Bankruptcy Code defines "securities clearing agency" by reference to the Securities Exchange Act of 1934. *See* § 101(48). That statute, in turn, defines "clearing agency" as "any person who acts as an intermediary in making payments or deliveries . . . or who provides facilities for comparison of data," as well as other parties that facilitate the handling of securities or the settlement of transactions without physical delivery of securities certificates. 15 U.S.C. § 78c(a)(23)(A).

A beneficial-interest interpretation of the statute would require a securities clearing agency to be something other than what it is – an intermediary – before

the safe harbor would protect a transaction from avoidance. The statute thus would provide no protection to the clearing agency or to the ultimate recipients of funds handled by the clearing agency, and these parties would be exposed to the vagaries of court decisions on whether or not they are conduits or initial transferees. The likely result would be the very sort of disruption of the markets that the Seventh Circuit identified as Congress's principal concern when it drafted the safe harbor (Pet. App. 14-15).

The imposition of a beneficial-interest requirement would treat the inclusion of clearing agencies in the statute as "stray marks on a page – notations that Congress regrettably made but did not really intend." *Advocate*, 137 S. Ct. at 1659. By contrast, an interpretation of "by or to . . . [a] securities clearing agency" that means exactly that, without the addition of qualifications by the courts, gives effect to Congress's policy choices and its language.[8]

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[8] Trust companies, indenture trustees, and other types of financial institutions also serve primarily or exclusively as intermediaries. Because the term "financial institution" is defined to include non-intermediary applications as well, the inclusion of that term in the safe harbor is not entirely meaningless. The implications of a restrictive interpretation for these types of institutions are discussed in Point II(B) below.

II. The Seventh Circuit's Narrow Construction of the Safe Harbor Is Misguided and Would Prove Disruptive.

The Seventh Circuit below strained to conclude that the transfers at issue were not made by or to financial institutions or, even if they were, that Congress did not intend to protect such transfers. To reach that conclusion, the court of appeals relied on case law construing Section 550 of the Bankruptcy Code narrowly, even though the courts did not develop those principles until years after Congress enacted the safe harbor. The Seventh Circuit's cramped interpretation of the statute also ill-serves Congress's goals. If it were adopted, it would produce puzzling outcomes and decrease certainty in numerous transactions in the financial markets, including significant transactions involving publicly traded securities. The court also placed undue emphasis on the legislative history of the 1980s version of the statute, when the relevant question is what the statute means after many subsequent amendments.

A. The safe harbor is not limited by judicial decisions construing Section 550, which identifies the parties obligated to repay an avoided transfer.

The Seventh Circuit developed its conduit exception to Section 546(e) by incorporating concepts from Section 550, which determines who may be required to repay a transfer that has been avoided (Pet. App. 12-13). This approach fails to respect the differences

between the language and the functions of several Code provisions.

1. The substantive avoidance statutes – Sections 544, 545, 547, and 548 – determine which transfers and obligations a trustee may avoid and identify affirmative defenses and other limitations specific to each avoidance power. These statutes focus mostly on the characteristics of the transfer that may be avoided, not the characteristics of the recipient. Section 547 sometimes refers to the "creditor," and several provisions of Sections 547 and 548 mention the "transferee," *see* §§ 547(b)(1), 547(e), 548(c), 548(d)(1), but none of these statutes discusses the "initial transferee," which is a concept specific to Section 550.

Avoidance is distinct from recovery. The trustee is not obligated to pursue recovery of a transfer, and avoidance alone may be sufficient in some situations. If the trustee's principal goal is to disallow a creditor's claim, for example, avoidance alone will do. *See* § 502(d); *Central Virginia Community College v. Katz*, 546 U.S. 356, 371 (2006). Recovery also is irrelevant if the trustee avoids a lien, which is a form of transfer. *See* § 101(54)(A). In that circumstance, the trustee obtains complete relief by avoiding the lien, which is automatically preserved for the benefit of the estate. *See* § 551. There is nothing to be recovered from any transferee.

When a trustee chooses to pursue recovery, Section 550 determines who may be liable. *See* § 550(a). Recovery from "the initial transferee" or "the entity for whose

benefit such transfer was made" is fairly straightforward. *See* § 550(a)(1). These parties are more or less strictly liable, except that they may be entitled to a lien on property to the extent that they improved it after receiving the transfer. *See* § 550(e). The trustee also may pursue recovery from a subsequent transferee, described as "any immediate or mediate transferee of such initial transferee." § 550(a)(2). But a subsequent transferee may assert a good-faith defense that is not available to the initial transferee. *See* § 550(b). Recovery also has a statute of limitations distinct from the one governing avoidance actions. *Compare* § 546(a) *with* § 550(f).

If Congress's goal had been merely to protect financial institutions and other specified entities from liability, it could have accomplished that by placing a prohibition on recovery from these parties in Section 550. If Congress had pursued that approach, financial institutions, stockbrokers, clearing agencies, and the like would have no exposure to a trustee's claims, but the customers of these institutions and others doing business with them would have potential liability. Congress instead put the safe harbor in Section 546 and precluded the trustee from avoiding the transfer in the first place. The dispositive issue is thus whether a transfer is made by, to, or for the benefit of a financial institution or another specified entity, not whether that entity would be an "initial transferee" if the trustee were permitted to avoid and recover the transfer.

2. The Seventh Circuit nevertheless conflated the concepts of "transfer . . . to" in Section 546(e) and

"initial transferee" in Section 550(a)(1). Specifically, the court of appeals concluded that Citizens would not be considered an initial transferee of the purchase price under Seventh Circuit case law. *See Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (holding that bank was not initial transferee of debtor's check because bank "acted as a financial intermediary" and "received no benefit"). The court reasoned that "transfer . . . to . . . a financial institution" must refer to a financial institution that has exposure as an initial transferee, which Citizens did not (Pet. App. 12-13). This analysis is flawed in several respects.

The first problem with this reasoning is that the conduit or intermediary construction of "initial transferee" is solely a function of case law. It is not universal, and it was not well-established when Congress enacted Section 546(e) and added financial institutions to it. The Seventh Circuit's decision in *Bonded Financial* has been influential, and many of the other circuits have adopted similar conduit principles to address the perceived inequity of imposing liability on a depository bank or another defendant that never had control of the funds transferred. *See In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1200-01 (11th Cir. 1988).[9] But the

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[9] *See also In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57-58 (2d Cir. 1997); *In re Southeast Hotel Properties L.P.*, 99 F.3d 151, 156 (4th Cir. 1996); *In re Coutee*, 984 F.2d 138, 141 (5th Cir. 1993); *In re Baker & Getty Financial Services, Inc.*, 974 F.2d 712, 722 (6th Cir. 1992); *In re Reeves*, 65 F.3d 670, 676 (8th Cir. 1995); *In re Bullion Reserve of*

protection of conduits in some jurisdictions is uncertain, and the conduit case law is subject to revision or overruling elsewhere. Moreover, there is no reason to believe that Congress would have been confident in the early 1980s that the courts would later develop this body of case law, such that it was unnecessary for Congress to protect financial institutions in Section 546(e).

A second difficulty with the Seventh Circuit's approach is that it is essentially inconsistent with the history of the case that prompted the enactment of the safe harbor in the first place. In *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975), the trustee of a commodities broker sued the New York Produce Exchange Clearing Association to recover more than $12 million in margin payments as fraudulent transfers. *See id.* at 126-27. The Association attempted to defend on the theory that "it was a mere 'conduit' for the transmittal of margins from debit to credit members." *Id.* at 135. Its motion for summary judgment was denied for insufficient evidence. *See id.* at 136.

The 1978 version of the safe harbor was intended to overrule *Seligson*. *See* S. Rep. No. 95-989, at 106 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5892. An interpretation of Section 546(e) that postulates that Congress was comfortable that intermediaries have no legal exposure to trustees in avoidance actions fails to

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North America, 922 F.2d 544, 549 (9th Cir. 1991); *In re First Security Mortgage Co.*, 33 F.3d 42, 44 (10th Cir. 1994). The First, Third, and District of Columbia Circuits do not have circuit-level conduit decisions.

account for Congress's singling out of *Seligson* for overruling. It also does not explain why Congress thought it necessary to include in the 1978 safe harbor parties that normally or frequently act as intermediaries, such as clearing agencies and commodity brokers. *See* § 764(c) (repealed 1982).

Third, there is the issue of when a transfer occurs. The date of a transfer is important in part because of time limitations built into the Bankruptcy Code. *See Barnhill*, 503 U.S. at 394-95. But the debtor's financial condition at the time of the transfer also is part of the trustee's prima facie case for avoidance. *See* §§ 547(b)(3), 548(a)(1)(B)(ii). The Seventh Circuit's approach raises a number of questions when an escrow agent holds funds for a period of time before disbursing them. Does the debtor's transfer occur when it sends funds to the conduit, or not until the conduit pays the initial transferee? On which date is the debtor's solvency or capitalization measured? If the transfer takes place when the debtor relinquishes its rights to the funds, as the Code suggests, *see* §§ 547(e), 548(d)(1), what is the significance of the fact that the ultimate recipient does not then have the funds? Is an ultimate beneficiary liable to repay a transfer that it never received? These questions have straightforward answers under a plain-language reading of the safe harbor. The transfer occurs when the debtor, or someone on the debtor's behalf, makes a payment to the escrow agent, but it cannot be avoided if the escrow agent is a financial institution.

The Seventh Circuit's focus on the ultimate beneficiary of a transfer also would lead to inconsistent results within a single transaction. The avoidability of a transfer, or a portion of a transfer, would depend on the identity of the investor and the manner in which it held its investment, not on the nature of the transaction generally.[10] Divergent outcomes within a single transaction or related transactions would increase market disruption rather than enhance it. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98, 121 (2d Cir. 2016) ("The broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy."), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317).

Finally, the initial-transferee concept has nothing to say about who the transferor is – *i.e.*, whether the transfer is made *by* a financial institution or another

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[10] In some transactions, the outcome would be more incoherent than inconsistent. For example, if Valley View had granted a lien to Citizens, as collateral agent for a group of lenders, to secure an obligation in connection with a securities contract, Valley View's trustee might have sued Citizens to avoid the lien as a preference or a fraudulent transfer. Citizens would not have had a Section 550 initial-transferee defense, because the trustee would not have been pursuing recovery of the transfer. (Also, Citizens would have been the *only* transferee of the lien; there would have been no other transferee for the trustee to pursue.) Would Citizens nevertheless be disregarded and the lien be partially avoided to the extent that it benefited pension funds and insurance companies that cannot take advantage of the safe harbor themselves?

protected entity. Neither Section 550 nor any other provision of the Code provides textual support for disregarding an institution that, as part of the financing or administration of a securities contract, transfers cash, securities, or other property to an ultimate beneficiary, or to another intermediary for eventual credit to the beneficiary.

The straightforward solution to these convoluted analyses is to confine Section 550 to its proper sphere: determining which parties may be required to repay an avoidable transfer. Section 546(e) addresses the antecedent question whether the transfer may be avoided at all. In some circumstances and in certain jurisdictions, the safe harbor may protect parties that also might be able to escape liability under initial-transferee principles. That overlap demonstrates that Congress and the courts have taken a comprehensive approach to the protection of participants in securities and commodities transactions, not that Congress intended in 1984 for the safe harbor to parallel the then-forthcoming case law interpreting Section 550.

B. A beneficial-interest requirement would produce anomalous results and introduce uncertainty into financial markets.

The Court stated recently that the Bankruptcy Code "standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX*, 132 S. Ct.

at 2073. Adoption of the Seventh Circuit's approach to Section 546(e) would ill-serve this goal.

1. The conduit approach to the safe harbor would introduce a disconnect between transfers that are protected and the types of transfers that, if avoided, might cause the sort of market disruption and firm failure that the Seventh Circuit perceived to be Congress's principal concern. Any transfer, no matter how small, that ultimately benefits one of the nation's largest commercial banks or investment banks would be protected. But billion-dollar transactions could be unwound to the extent that they benefit public and private pension funds, insurance companies, state and local government investment funds, and private-equity funds, all of which play critical roles in the capital markets.

The Seventh Circuit's construction also would not protect smaller market players, including individual investors, their retirement plans, investment clubs, and employee stock ownership trusts. As a general matter, investors like these are less likely than major market players to be able to absorb a loss in avoidance litigation with a bankruptcy trustee or to take legal steps that might offer greater protection. It is unlikely that Congress intended to leave smaller investors exposed while protecting major players, including the brokers who handle accounts for those smaller investors. *See* § 101(53A) (defining "stockbroker" to include both a broker trading for its own account and a broker acting on behalf of a customer).

The plain-language interpretation of the safe harbor does not suffer from these inconsistencies. To be sure, it also protects parties in some smaller transactions that could be unwound without threatening the stability of the markets. But it does so evenhandedly; if a transaction is large or complex enough that financial institutions, stockbrokers, or other entities named in the statute are involved, then the transaction is final as to both the direct and the beneficial recipients of transfers made to those institutions, absent actual fraud.

2. As discussed above, a beneficial-interest requirement would eliminate any protection for securities clearing agencies and those engaging in transactions through clearing agencies. In addition, financial institutions and their customers most likely would lose coverage in situations in which institutions act on behalf of their customers.

For example, a trust company is a financial institution under the Code. *See* § 101(22)(A). A common-law trustee holds only "a nonbeneficial interest of unlimited duration in the trust property" for the benefit of the trust beneficiaries. Restatement (Third) of Trusts § 42 (2003). Financial institutions also frequently serve as indenture trustees. *See generally In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d 963, 968 (5th Cir. 1992) (discussing responsibility of indenture trustee to protecting interests of debentureholders); *LNC Investments, Inc. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 459-60 (2d Cir. 1999) (discussing litigation by bondholders against indenture trustee). A beneficial-interest

requirement would expose trust beneficiaries and noteholders to liability for payments made by a debtor to the financial institution serving as their trustee.[11]

Determining the precise contours of the conduit principle could require years of litigation. *See generally Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1414 (2017) (noting that one difficulty with creating an exception to the Code is that it requires "defining the boundaries of the exception"). One fertile ground for litigation would be the treatment of a mutual fund, which qualifies as a financial institution when a securities contract is involved. *See* § 101(22)(B); *Investment Co. Institute v. Camp*, 401 U.S. 617, 625 n.11 (1971) ("A mutual fund is an open-end investment company."). But a mutual fund "is a 'mere shell,' a pool of assets consisting mostly of portfolio securities that belong to the individual investors holding shares in the fund." *Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir. 1977); *see also Jones v. Harris Associates L.P.*, 559 U.S. 335, 338 (2010) (adopting "pool of assets" description). If the scope of the safe harbor is determined by the economic substance of a transaction, rather than by the involvement of the parties identified by Congress, mutual

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[11] It is possible to imagine limited circumstances in which the safe harbor protects the entities discussed here. For example, a trust company might purchase commercial paper as a short-term investment of revenues it has earned from trust services but does not yet need for operating expenses. But the safe harbor would not apply when these institutions perform their core function of acting on behalf of other parties.

funds and their beneficial owners may be exposed to liability.

The Seventh Circuit's approach creates uncertainty along another axis as well – how should a transfer involving a protected entity be treated if the beneficiary is not itself protected by the safe harbor, but unwinding the transaction nevertheless would create a "ripple effect through the financial markets" (Pet. App. 15)? As the Second Circuit has observed, "A transaction involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets." *Quebecor World*, 719 F.3d at 100. The Seventh Circuit did not identify the degree of "ripple effect" that would be sufficient to justify protecting a transaction. But even if that concept were well-understood, the difference between a transaction that merely touches the financial markets and one that would seriously impact the markets if it were undone is not normally apparent at the outset of litigation. Indeed, the ultimate beneficiaries of transfers may not even be identified until parties originally named as defendants assert third-party claims against others or respond to discovery requests.

3. If the individuals and entities discussed above are not protected by the safe harbor, the effects on the financial markets are likely to be substantial. A trustee generally can pursue avoidance of a fraudulent transfer four or more years after a transaction is consummated. *See* §§ 548(a)(1) (permitting avoidance of transfers made two years before bankruptcy), 546(a)(1)

(allowing trustee to bring suit two years after bankruptcy). The gap between an investor's receipt of a payment and its receipt of a summons may be much longer if the trustee is able to use Section 544(b) to stand in the shoes of a creditor that has a longer limitation period under applicable law, such as the Internal Revenue Service. *See, e.g.*, *In re Kipnis*, 555 B.R. 877, 879, 881-83 (Bankr. S.D. Fla. 2016) (authorizing trustee to attack 2005 transaction in 2014 bankruptcy case); 26 U.S.C. § 6502(a) (establishing 10-year limitation period for IRS).

An individual or institution that receives a payment in connection with a securities or commodities transaction has two basic choices: move forward with confidence that the transaction is final, except for the remote possibility that it was motivated by fraudulent intent, or create a reserve or some other contingency plan for a potential liability that may not arise for years.[12] Finality, and the stability that results, are great virtues in this context; they permit individuals to withdraw retirement funds for their living expenses, pension funds to pay benefits, and private-equity funds

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[12] To the extent that an investor has an opportunity to approve or dissent from a proposed transaction – which is not always the case, legally or practically – a weak safe harbor also would distort the market. The investor would need to evaluate the potential for avoidance claims if the purchaser in the proposed transaction were to end up in bankruptcy in the future. If the investor could not justify the time and expense of that analysis, the simplest alternative might be to sell the securities on the public market, most likely at a discount to the price offered in the proposed transaction.

to reinvest proceeds into other companies. If these investors must instead prepare for the worst because of long-tailed potential liability to a bankruptcy trustee, their ability to provide capital (and, in the case of retirees, to enjoy their retirement) may be severely limited. *See Tribune*, 818 F.3d at 122 ("The need to set aside reserves to meet the costs of litigation – not to mention costs of losing – would suck money from capital markets.").

C. The reach of Section 546(e) today is not constrained by the legislative history of an earlier version.

Fundamental to the Seventh Circuit's analysis is its view that the principal goal of the safe harbor is to protect against systemic risk in the securities and commodities industries (Pet. App. 14-15). Congress described the new safe harbor in those terms in 1982. *See* H.R. Rep. No. 97-420 (1982), at 1, *reprinted in* 1982 U.S.C.C.A.N. 583 (discussing the need "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market"). But the Seventh Circuit relied on this legislative history to effectively limit the since-amended safe harbor only to claims that threaten systemic risk. That is not a tenable interpretation of the broad language at issue.

1. As discussed above, the version of the statute described in the legislative history has been amended repeatedly since 1982. The Court has often warned

about the hazards of using the statements of a later Congress to determine the intent of an earlier one. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 529-30 & n.27 (2007); *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). The Seventh Circuit's approach – using the views of an earlier Congress to delimit amendments made by a later Congress – is even more perilous.[13]

An example is instructive. In *Hall*, the debtors argued that legislative reports related to the enactment of the Bankruptcy Code in 1978 explained the appropriate treatment of taxes incurred during their Chapter 12 bankruptcy case. *See Hall*, 132 S. Ct. at 1892. The Court noted that Chapter 12 was enacted in 1986 and that the tax provisions of the Code were amended in 1980 and 2005. *See id.* at 1885, 1888. The Court thus declined to rely on the older materials "to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades." *Id.* at 1893.

2. The Seventh Circuit's approach would be problematic even if the safe harbor had not been amended since 1982. Congress's approach to the safe harbor was prophylactic, not surgical, from the beginning. The statute has always advanced the interests of

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[13] The Seventh Circuit also cited one snippet of legislative history from the 2005 amendment (Pet. App. 14-15). But that reference to "systemic risk in the financial marketplace" appeared in the introduction to a House Report than was more than 300 pages long; it did not address the safe harbor specifically. H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

parties in the finality of transactions, not merely society's interests in avoiding a market meltdown. In 1982, a trustee could not avoid a transfer of a $100 margin payment by a customer to a stockbroker, even though the broker could easily afford to repay the $100, or a $100 million settlement payment by a broker to a customer, even though the payment rendered the broker insolvent.

Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address. The Court has remarked on this phenomenon, and resolved disputes accordingly, in several bankruptcy cases. For example, the legislative history behind a 1984 amendment to the preference statute suggested that Congress's goal was to protect creditors holding short-term obligations, but the amendment was broad enough to protect long-term creditors as well. *See Union Bank*, 502 U.S. at 157-58. The Court said that the fact that "Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Id.* at 158.

The same tension arose in *Toibb*, in which the Court was required to determine whether an individual not engaged in business could obtain relief under Chapter 11. The Court concluded that Congress expected that Chapter 11 would be used primarily by debtors engaged in business, but the plain language of the Code also permitted non-business debtors to file. *See Toibb*, 501 U.S. at 163. And in *Patterson*, the legislative history suggested that Congress intended to

exclude spendthrift trusts from the bankruptcy estate. *See Patterson*, 504 U.S. at 761-62. But Congress accomplished that goal with language broad enough to exclude ERISA-qualified plans from the estate as well, and the Court interpreted the Code accordingly. *See id.*

If Congress had intended the safe harbor to preclude only claims threatening systemic harm to the financial markets, it could have established a dollar threshold; it could have limited the statute to transfers involving publicly traded securities; or it could have instructed bankruptcy judges to evaluate the potential consequences before granting judgment to a trustee. When Congress wants to provide limited or conditional protection to creditors, it makes its intent clear. Congress took that approach in Chapter 13, precluding a debtor from modifying an automobile loan that was incurred within 910 days before the bankruptcy filing. *See* § 1325(a)(9). This statutory limit protects creditors from abusive behavior while still permitting debtors to obtain relief from older debts that, in many cases, will have been paid down and will be secured by depreciated vehicles. By contrast, a debtor cannot modify a mortgage on his or her principal residence at all, regardless of the loan balance or the length of the lending relationship. *See* § 1322(b)(2). This absolute prohibition reflects a legislative judgment that the mortgage market should be shielded from interference. *See Nobelman*, 508 U.S. at 332 (Stevens, J., concurring).

Congress's comprehensive approach to securities and commodities transactions in Section 546(e) is comparable to its treatment of home mortgages in Chapter

13. Some level of imprecision is inherent in this or any other bright-line rule, which inevitably will cover more than the kernel of the problem it addresses and, in some situations, may also be underprotective. *See Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 78 (2011). That is no basis, however, for interpreting the rule to be something other than a bright line. *See id.* The Court cannot "rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

D. The Seventh Circuit's concern that a broad interpretation of Section 546(e) would allow only transfers made in "cold hard cash" to be avoided does not justify denial of all protection.

The Seventh Circuit appeared to be concerned that a broad reading of the safe harbor would insulate nearly every securities and commodities transaction from avoidance, because of the prevalence of financial institutions in modern life. (Pet. App. 11). In particular, the court characterized Petitioner's view of Section 546(e) as "so broad as to render any transfer non-avoidable unless it were done in cold hard cash" (*Id.*). Congress's language is undeniably broad and may reach a great many securities and commodities transactions, but the Court need not locate the outer reaches of the safe harbor to resolve this case.

Credit Suisse and Citizens played active and meaningful roles in the transaction in this case. Citizens, in particular, entered into an agreement governing its rights and responsibilities; it received and held both cash and securities; and it distributed them to the appropriate parties when particular conditions had been satisfied. In this respect, Citizens provided services comparable to those performed by a commodity broker, a stockbroker, or a securities clearing agency. Neither institution simply processed a check or a wire transfer on behalf of the buyer or seller.[14]

The canon *noscitur a sociis* suggests that a transfer triggers Section 546(e), at the very least, when it involves a financial institution that plays a part or serves in a role roughly comparable to a broker or a clearing agency. *See generally Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013) (applying canon to § 523); *Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015) (plurality opinion) (applying canon to conclude that "record, document, or tangible object" does not include fish). Congress added financial institutions to Section 546(e) in 1984, when it already covered commodity brokers, stockbrokers, and clearing agencies, all of which play significant roles in closing and administering transactions in commodities and securities, often acting on behalf of third parties.

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[14] A third alternative is addressed specifically in the Code. If a financial institution "is acting as agent or custodian for a customer . . . in connection with a securities contract," the customer is treated as a financial institution. § 101(22)(A).

See Quebecor World, 719 F.3d at 100 ("[T]he enumerated intermediaries are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers."); *United States v. Williams*, 553 U.S. 285, 294 (2008) (a word "is given more precise content by the neighboring words with which it is associated").

A financial institution is similar to these entities when it is actively involved with both the funds and the securities or commodities being exchanged, or when it otherwise assists in the settlement or administration of the transaction. Thus, a transfer by or to an institution that extends a credit facility designed to permit a borrower to purchase securities, or that ensures that cash and securities are secured and exchanged under agreed-upon terms, is within the safe harbor.[15]

* * *

Congress has determined that many transactions in securities and commodities should not be unwound in bankruptcy litigation. These include not only

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[15] The Court also can reach the same conclusion by another route. A protected transfer must be made by, to, or for the benefit of a financial institution "in connection with a securities contract." § 546(e). The Court has recognized that "the phrase 'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013). If a limiting principle is needed in this case, one is readily apparent: a transfer has the requisite connection to a securities contract if a financial institution makes or receives it in the course of its responsibility for financing, closing, administering, or settling the transaction.

billion-dollar mergers and acquisitions in which the consideration flows to major banks and investment banks, but also transactions, large and smaller, that require the services of financial institutions, stockbrokers, clearing agencies, and similar entities. The court of appeals went astray by adopting a narrow view of what Congress might have been attempting to accomplish, or what Congress first set out to do several decades ago. This Court should instead give effect to the language that Congress chose to implement its policy decisions, which bars a trustee from avoiding a transfer by or to one of these institutions even if the transfer is for the ultimate benefit of someone else.

CONCLUSION

For these reasons, the judgment below should be reversed, and this case should be remanded for further proceedings.

Respectfully submitted,

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STATUTORY APPENDIX

11 U.S.C. § 101

In this title the following definitions shall apply:

. . . .

(6) The term "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title.

. . . .

(22) The term "financial institution" means –

(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means –

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

. . . .

(26) The term "forward contract merchant" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or

in the future becomes the subject of dealing in the forward contract trade.

. . . .

(48) The term "securities clearing agency" means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of section 17A.

. . . .

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.

. . . .

(53A) The term "stockbroker" means person –

(A) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities –

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account.

. . . .

(54) The term "transfer" means –

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –

(i) property; or

(ii) an interest in property.

. . . .

— —

11 U.S.C. § 544

. . . .

(b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable

under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

— —

11 U.S.C. § 545

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien –

(1) first becomes effective against the debtor –

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

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11 U.S.C. § 547

. . . .

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . . .

(e) (1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

. . . .

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11 U.S.C. § 548

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the

debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation

to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which –

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

. . . .

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected

cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section –

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

. . . .

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11 U.S.C. § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from –

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent

debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

. . . .

(e) (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of –

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

. . . .

(f) An action or proceeding under this section may not be commenced after the earlier of –

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

———.

11 U.S.C. § 741

In this subchapter –

. . . .

(7) "securities contract" –

(A) means –

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in section 101);

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an

option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi));

(iv) any margin loan;

(v) any extension of credit for the clearance or settlement of securities transactions;

(vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;

(vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;

(viii) any combination of the agreements or transactions referred to in this subparagraph;

(ix) any option to enter into any agreement or transaction referred to in this subparagraph;

(x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a

securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or

(xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade;

. . .

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